Supreme Court U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1245

WILLIAM A. ALBAUGH,
Democratic Candidate in the Contested 1976 Maryland Primary Election for United States Senator Nomination,

Petitioner,

v.

THE UNITED STATES GOVERNMENT; FRANCIS R. VALEO, Secretary of the United States Senate; EDMUND L. HENSHAW, JR., Clerk of the United States House of Representatives; JUANITA KREPS, Secretary of Commerce, and REGINALD A. ASPLEN, Chairman of the State Administrative Board of Election Laws,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit, dated December 23, 1976, dismissing the appeal from

the judgment of the United States District Court for the District of Maryland, entered May 6, 1976, dismissing Petitioner's complaint seeking relief to prevent or correct Respondents' error in certifying 1976 United States Senate election results from the State of Maryland on the false assumption that the District of Columbia has legally ceased to be a part of the State of Maryland.

The judgment of the District Court is found on page 6a of this petition's appendix and the judgment of the Court of Appeals is found on page 7a.

OPINIONS

The opinion of the District Court for the District of Maryland is found on page 1a of this petition's appendix and the combined judgment and opinion of the Court of Appeals is found on page 7a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1976 (App. 7a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether the Petitioner has standing to obtain a Court decision on the key question in view of the *res judicata* technical defense advanced by Respondents?

II. Whether any law changing the boundary of the State of Maryland is automatically a redistricting law subject to the one man-one vote rule?

III. Whether the "unproducible" law which authorized the removal of the District of Columbia from the State of Maryland would be constitutional if it could be produced?

IV. Whether, granted the District of Columbia has not been constitutionally removed from the State of Maryland, Constitutional Amendment XXIII is inoperative?

V. Whether the present apportionment law 2 U.S.C. § 2a is in conflict with the Constitutional provision that requires the seats in the United States House of Representatives be apportioned in direct proportion to state population?

CONSTITUTIONAL AND STATUTORY LAWS INVOLVED

I. Constitution Art. I, Sec. 2

> "* * * Representatives * * * shall be apportioned among the several States which may be included within this Union, according to their respective numbers, * * *."

II. Constitution Art. I, Sec. 4

> "The times, places and manner of holding elections for senators and representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations * * *."

III. Constitution Art. I, Sec. 8(17)

> "The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square)

as may, by cession of particular States, and the acceptance of Congress, become the seat of Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings * * *."

IV. Constitution Art. IV, Sec. 2

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States * * *."

V. Constitutional Amendment XXIII

"Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representativess in Congress to which the District would be entitled if it were a State; they shall be in addition to those appointed by the States, but they shall be considered for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation."

VI. Title 2, United States Code, Sec. 2a

"* * * A Statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the * * * decennial census of population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member. * * *"

STATEMENT OF THE CASE

On March 12, 1976, the Petitioner, William A. Albaugh, candidate for the Democratic Nomination for the United States Senator in the Maryland May 18, 1976, Primary Election, filed a complaint in the United States District Court for the District of Maryland against the Respondents, the United States Government; Francis R. Valeo, Secretary of the United States Senate; Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives; Elliot L. Richardson, Secretary of Commerce (1976); and Reginald A. Asplen, Chairman of the State Administrative Board of Election Laws, alleging that the Respondents were corrupting the 1976 United States Senate Elections in the State of Maryland by arbitrarily excluding District of Columbia resident citizens in conflict with the cession ruling set forth by the Supreme Court in *Evans v. Cornman*, 398 U.S. 419 (1970). Petitioner asserted that the excluded half million votes of District of Columbia citizens were enough to have a decisive effect on the election results and that as a candidate he was entitled to a fair election count.

In seeking an interlocutory and permanent injunction to block the transfer of the invalid final election results to the United States Senate under the authority of Maryland Art. 33, Petitioner requested a determination by a bench of three Judges under the authority of 28 U.S.C. § 2281.

On May 6, 1976, the District Court, in accordance with its May 5, 1976, opinion (App. 6a), dismissed the complaint. On December 23, 1976, the United States Court of Appeals for the Fourth Circuit dismissed the appeal without reaching the merits on the basis of the *res judicata* doctrine (App. 7a).

REASONS FOR GRANTING THIS WRIT

I. PETITIONER HAS STANDING TO OBTAIN A COURT DECISION ON THE KEY QUESTION NOTWITHSTANDING THE *RES JUDICATA* DEFENSE ADVANCED BY RESPONDENTS.

Respondents argue that *res judicata* derived from *Albaugh v. Tawes,* 233 F. Supp. 576 (D. Md. 1964), destroys any standing the Petitioner might otherwise have for a hearing of this case on the merits.

Petitioner maintains that the *Albaugh v. Tawes* case failed to address the key question of whether a removal law is automatically a redistricting law that must comply with the one man-one vote rule. Although the Court ruled that the District of Columbia had been treated by the Government as if it had been legally removed from Maryland since the passage of the Organic Act, 2 Stat. 103, ch. 15, February 27, 1801, the Court carefully avoided specifying that any particular law actually removed the District of Columbia from Maryland.

In any event, Petitioner maintains that the Supreme Court's cession ruling in *Evans v. Cornman,* 398 U.S. 419 (1970), not only established that land ceded by the State of Maryland to the United States did not alter the boundary of the State nor disenfranchise the resident citizens of the ceded territory but it gave all Maryland citizens, including Democratic primary candidates for the United States Senate, standing to contest any primary or general election for the United States Senate seat from Maryland where resident citizens of ceded territory were arbitrarily denied the right to register and vote in such an election.

II. ANY LAW CHANGING THE BOUNDARY OF THE STATE OF MARYLAND IS AUTOMATICALLY A REDISTRICTING LAW SUBJECT TO THE ONE MAN-ONE VOTE RULE.

Whether the Supreme Court, Congress or the Maryland Legislature enacts the Maryland Congressional Election Redistricting Laws, these laws must subdivide the whole State into substantially equal-population Congressional Districts. There is no way to remove land from the State of Maryland without removing land from at least one Congressional District. Assuming that the Respondents could produce a removal law, which they can't, which specifies that the District of Columbia be removed from the State of Maryland, the removal law would itself be a Congressional Redistricting law.

III. THE "UNPRODUCIBLE" LAW WHICH AUTHORIZED THE REMOVAL OF THE DISTRICT OF COLUMBIA FROM THE STATE OF MARYLAND WOULD BE UNCONSTITUTIONAL IF IT COULD BE PRODUCED.

If removal laws are Congressional Redistricting Laws subject to the one man-one vote rule, the "unproducible" law which removed the District of Columbia from the State of

Maryland would be unconstitutional because it failed to transfer District of Columbia residents to another State where their right to equal voting representation in Congress could be exercised.

The fact that the Maryland State Legislature has never enacted any law consenting to making the District of Columbia part of another State as required by the Constitution is further evidence to support Petitioner's position that the District of Columbia has not been removed from the State of Maryland and that the District of Columbia citizens have a right to participate in Maryland elections on an equitable basis.

IV. GRANTED THE DISTRICT OF COLUMBIA IS STILL PART OF THE STATE OF MARYLAND, CONSTITUTIONAL AMENDMENT XXIII IS INOPERATIVE.

Constitutional Amendment XXIII looks like it was written by someone who wanted to make it "inoperative" in case it was again necessary to relocate the seat of Government and put it in another State. If the seat of Government is located in a State, the amendment's language is self-contradictory. Constitutional Amendment XXIII provides:

> * * * A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, * * *.

Obviously, if the seat of Government is located within a State, there is no way to assign any electors to the District in addition to the electors assigned to the State within which the seat lies.

V. THE APPORTIONMENT LAW 2 U.S.C. § 2a WHICH PROVIDES THAT HOUSE SEATS BE DISTRIBUTED BY THE METHOD OF EQUAL PROPORTIONS IS UNCONSTITUTIONAL.

In thinking about the obvious mistakes that Respondents are making in the process of running Maryland Congressional Elections, one can't avoid seeing the malapportionment of the House of Representatives. If one adjusts Maryland's 1970 population to include that of the District of Columbia and computes the apportionment of seats in direct proportion to new corrected State populations, one can't avoid seeing that the "equal proportions" method of distributing seats is unconstitutional.

If fractional seats are distributed by the method known as "major fractions with carryover," the ratio of seats distributed to a State in comparison to all the seats distributed will be the "exact" same ratio as the ratio of the of the State population to the total population. Where the apportionment computation carries over fractional interest in a house seat to future apportionments, a State with a one-fifth interest in a seat each census period ends up getting an extra house seat every five census periods. Under the present "equal proportions" method, these small fractional interests are always totally lost.

Constitution Art. I, Sec. 2 provides:

> "* * * Representatives * * * shall be apportioned among the several States which may be included within this Union, according to their respective numbers * * *."

CONCLUSION

Wherefore, Petitioner respectfully submits that Respondents have incorrectly assumed that the District of Columbia has been legally removed from the State of Maryland and, accordingly, have misconducted the Maryland Congressional Elections in 1976 and malapportioned Congress, and Petitioner respectfully prays that this Petition for Certiorari be granted.

Respectfully submitted,

WILLIAM A. ALBAUGH
P.O. Box 158
Mt. Rainier, Maryland 20822
Petitioner, Pro Se

APPENDIX

[Filed May 5, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM A. ALBAUGH, Democratic Candidate in the Contested 1976 Maryland Primary Election for United States Senator Nomination,	:	
v.	:	CIVIL NO. T-76-378
THE UNITED STATES GOVERNMENT, et al.	:	

Filed: May 5, 1976

William A. Albaugh, pro se.

Daniel F. Goldstein, Assistant United States Attorney, for the United States and federal defendants; Francis B. Burch, Attorney General of Maryland, and George A. Nilson, Assistant Attorney General, for the state defendant.

Thomsen, Senior District Judge

Plaintiff again seeks a judgment declaring that the District of Columbia should be treated as a part of the State of Maryland for purposes of the census report and the apportionment of seats in the United States House of Representatives, and that "the conduct of the Maryland U. S. Senate Election be corrected to reflect the population of the District of Columbia being counted as an integral part of the population of the State of Maryland". Plaintiff, who is a registered voter in Prince George's

County, Maryland, is seeking nomination as the Democratic candidate for a seat in the United States Senate in the primary election which will be held this month, and has brought this action against the United States and various federal and state officials.

A similar action, filed by plaintiff in 1964, was heard by a three-judge court in this district and resulted in a judgment denying relief for reasons stated in a full opinion, *Albaugh v. Tawes,* 233 F. Supp. 576. That judgment was affirmed by the Supreme Court, per curiam, without an opinion, *Albaugh v. Tawes,* 379 U.S. 27 (1964), rehearing denied, 379 U.S. 940 (1964).[1]

In an effort to avoid the defense of res judicata, raised by defendants herein, plaintiff cites *Evans v. Cornman,* 398 U.S. 419 (1970), affirming a decision of a three-judge court in this district, *Cornman v. Dawson,* 295 F. Supp. 654 (1969). That case dealt with the right of persons residing on the grounds of the National Institute of Health, a federal enclave in Montgomery County, Maryland, to vote in Maryland elections, and held that the denial of such right violated the Equal Protection Clause of the Fourteenth Amendment. The facts in that case were different in essential respects from the facts in this case. The Court said, in pertinent part:

> "* * * Appellees clearly live within the geographical boundaries of the State of Maryland, and they are treated as state residents in the

[1] Another generally similar action filed by plaintiff in the United States District Court for the District of Columbia (Civil Action No. 74-1282) was dismissed by Judge Gesell.

census and in determining congressional apportionment. They are not residents of Maryland only if the NIH grounds ceased to be a part of Maryland when the enclave was created. However, that 'fiction of a state within a state' was specifically rejected by this Court in *Howard v. Commissioners of Louisville,* 344 U.S. 624, 627 (1953), and it cannot be resurrected here to deny appellees the right to vote." 398 U.S. at 421-22.

"Appellants do not deny that there are numerous vital ways in which NIH residents are affected by electoral decisions. Thus, if elected representatives enact new state criminal laws or sanctions or make changes in those presently in effect, the changes apply equally to persons on NIH grounds. Under the Federal Assimilative Crimes Act, 18 U.S.C. § 13, 'acts not punishable by any enactment of Congress are punishable by the then effective laws of the State in which the enclave is situated.' *United States v. Sharpnack,* 355 U.S. 286, 287 (1958). Further, appellees are as concerned with state spending and taxing decisions as other Maryland residents, for Congress has permitted the States to levy and collect their income, gasoline, sales, and use taxes – the major sources of state revenues – on federal enclaves. See 4 U.S.C. §§ 104-110. State unemployment laws and workmen's compensation laws likewise apply to persons who live and work in federal areas. See 26 U.S.C. § 3305(d); 40 U.S.C. § 290. Appellees are required to register their automobiles in Maryland and obtain drivers' permits and license plates from the State; they are subject to the process and jurisdiction of state

courts; they themselves can resort to those courts in divorce and child adoption proceedings; and they send their children to Maryland public schools.

"All of these factors led the District Court to 'conclude that on balance the [appellees] are treated by the State of Maryland as state residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote.' 295 F. Supp., at 659. Appellants resist that conclusion, arguing that NIH residents do not pay the real property taxes that constitute a large part of the revenues for local school budgets [Footnote omitted]. However, Maryland does not purport to exclude from the polls all persons living on tax-exempt property, and it could not constitutionally do so. *Cipriano v. City of Houma, supra* [395 U.S. 701, 702 (1969)]; see *Kramer v. Union School District, supra* [395 U.S. 621, 622 (1969)]. Of the other differences asserted between Maryland residents who live on federal enclaves and those who do not, most are far more theoretical than real [Footnote omitted]. In any case, these differences, along with whatever others may exist, do not come close to establishing that degree of disinterest in electoral decisions that might justify a total exclusion from the franchise.

"In their day-to-day affairs, residents of the NIH grounds are just as interested in and connected with electoral decisons as they were prior to 1953 when the area came under federal jurisdiction and as are their neighbors who live off

> the enclave. In nearly every election, federal, state, and local, for offices from the Presidency to the school board, and on the entire variety of other ballot propositions, appellees have a stake equal to that of other Maryland residents. As the District Court concluded, they are entitled under the Fourteenth Amendment to protect that stake by exercising the equal right to vote." 398 U.S. at 424-26.

There is a real difference between residents of the District of Columbia and NIH residents. Congress has given certain voting rights to residents of the District; for additional rights, they and the plaintiff herein must look to Congress. *Albaugh v. Tawes,* supra, is still good law, and controls the decision of this case.

Plaintiff has moved that a three-judge court be convened. However, 28 U.S.C. 2281 does not require the convening of a three-judge court when the constitutional attack upon a state statute is insubstantial, obviously without merit in the light of previous decisions. *Ex parte Poresky,* 290 U.S. 30, 32 (1933); *Bailey v. Patterson,* 369 U.S. 31, 33 (1962); *Swift & Co. v. Wickham,* 382 U.S. 111, 114-15 (1965); *Goosby v. Osser,* 409 U.S. 512, 518 (1973).

Judgment will be entered dismissing the complaint.

/s/ Roszel Thomsen
Senior U. S. District Judge

[Filed May 6, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM A. ALBAUGH, Democratic Candidate in the Contested 1976 Maryland Primary Election for United States Senator Nomination,	:	
v.	:	CIVIL NO. T-76-378
THE UNITED STATES GOVERNMENT et al.	:	

JUDGMENT

In accordance with the Opinion dated May 5, 1976 filed in the above case, it is

ORDERED AND ADJUDGED: That judgment is hereby entered dismissing the complaint with costs to be taxed against the plaintiff.

Dated at Baltimore, Maryland this 6th day of May 1976.

PAUL R. SCHLITZ
Clerk

By /s/ James P. Walker
Deputy Clerk

[cc:]

[Filed December 23, 1976] [UNPUBLISHED]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1549

William A. Albaugh, Democratic Candidate in the Contested 1976 Maryland Primary Election for United States Senator Nomination,

Appellant,

vs.

The United States Government; Francis R. Valeo, Secretary of the United States Senate; Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives; Elliot L. Richardson, Secretary of Commerce; and Reginald A. Asplen, Chairman of the State Administrative Board of Election Laws,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, District Judge.

Submitted: October 28, 1976 Decided: December 23, 1976.

Before WINTER, CRAVEN, and BUTZNER, Circuit Judges.

(William A. Albaugh, Appellant *Pro Se.* Jervis S. Finney, United States Attorney, and Daniel F. Goldstein, Assistant United States Attorney, on brief for the Appellees The United States Government, Valeo, Henshaw and Richardson. Francis B. Burch, Attorney General of Maryland, and George A. Nilson, Assistant Attorney General, on brief for the Appellee Asplen.)

PER CURIAM:

The appellant Albaugh here seeks to raise claims that have been considered and decided against him in previous proceedings. See *Albaugh v. Tawes*, 233 F. Supp. 576 (D. Md.), 379 U.S. 27, *reh. den.*, 379 U.S. 940 (1964); *Albaugh v. Agnew, Gov. of Md. and C. Stanley Blair, Sec. of State*, Civil No. 19599 (D. Md. 1968); *Albaugh v. Mandel, et al.*, Civil No. 74-1282 (D.D.C. 1974).

We need not consider the other issues raised by the appellees in their brief, since it appears that the appellant's action is barred by the doctrine of *res judicata.*

Accordingly, the appeal is dismissed.

DISMISSED.

Supreme Court, U. S.
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MAY 11 1977
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OCTOBER TERM, 1976

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v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1245

WILLIAM A. ALBAUGH, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this action in the United States District Court for the District of Maryland, challenging the constitutionality of the cession of the District of Columbia from the State of Maryland to the United States. The district court dismissed the complaint on the authority of *Albaugh* v. *Tawes*, 379 U.S. 27, affirming 233 F. Supp. 576 (D. Md.), in which petitioner had been the plaintiff, and the court of appeals affirmed *per curiam* on the ground of *res judicata* (Pet. App. 1a-5a, 7a-8a).

Petitioner's contentions on the constitutional merits of this case are frivolous, were rejected by this Court in

Albaugh v. *Tawes, supra,*[1] and do not warrant reconsideration. The cession of the District of Columbia to the United States was authorized by Article I, Section 8, Clause 17 of the Constitution,[2] and under that provision Congress has plenary legislative authority over the District of Columbia and its residents. Petitioner's principal concern is with the voting rights of District residents in federal elections, but as the district court below correctly observed (Pet. App. 5a), "Congress has given certain voting rights to residents of the District; for additional rights, they and the plaintiff herein must look to Congress."

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

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[1]The issue also was decided against petitioner in *Albaugh* v. *Agnew*, Civil Action No. 19599 (D. Md.). See also *Albaugh* v. *Mandel*, No. 74-1282 (D.D.C.). Since the federal government was not a party defendant in the earlier cases in which petitioner's claim was rejected on the merits, arguably the present suit was not barred by *res judicata*. But cf. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313. But it is clear that petitioner has had ample opportunity in prior cases to litigate his claim, and at least *Albaugh* v. *Tawes* constitutes *stare decisis* if not *res judicata* as to the issue presented.

[2]Cession was made by Maryland in its Act of December 23, 1788, chapter 46, and accepted by Congress by the Act of July 16, 1790, chapter 28, 1 Stat. 130.

DOJ-1977-05